

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7096

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BETH L. NAPRSTEK, a minor, by her mother and next friend, BARBARA C. NAPRSTEK; BARBARA C. NAPRSTEK on her own behalf; DANE LATHAM, a minor, by his father and next friend, RON LATHAM; RON LATHAM on his own behalf; JOY MASSEY, a minor, by her father and next friend, THOMAS MASSEY; THOMAS MASSEY on his own behalf; JAMES A. ROBINSON, a minor, by his mother and next friend, JUANITA Y. ROBINSON; JANINE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; LYNNE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; JUANITA Y. ROBINSON on her own behalf; all of the foregoing individually and on behalf of all others similarly situated,

No. 76-7096

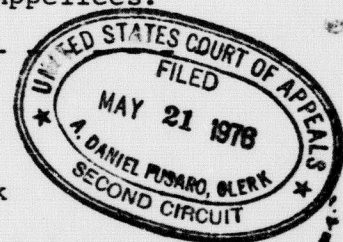
Plaintiff-Appellants,

- v -

The CITY OF NORWICH, an incorporated municipality; FREDERICK B. MIRABITO, in his official capacity as Mayor of the City of Norwich; EDWARD J. LEE, in his official capacity as Attorney for the City of Norwich; IRAD S. INGRAHAM, in his official capacity as District Attorney for the County of Chenango; JACK C. SACKETT, in his official capacity as Chief of Police of the City of Norwich,

Defendant-Appellees.

On Appeal from the
United States District Court
for the
Northern District of New York



BRIEF FOR APPELLEES

City of Norwich; Frederick B. Mirabito, Mayor;
Edward J. Lee, City Attorney and Jack C. Sackett,
Chief of Police

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City of Norwich, Frederick B.
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Lee, Attorney and Jack C.
Sackett, Chief of Police of
the City of Norwich

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TABLE OF AUTHORITIES

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STATEMENT OF SUBJECT MATTER

Appellants seek to set aside an Order and Judgment of the Honorable Floyd F. McMahon, of the United States District Court for the Northern District of New York dismissing the action seeking to invoke the Civil Rights Act, 42 U.S.C. § 1343, against the Appellees, City of Norwich et al. The Order of the Court dismissed the action as to the City of Norwich, closed the action statistically, and placed the action in suspense as to the remaining defendants, Appellees.

Appellants now seek the same injunction before this Court. The Appellees contend that the matter is not appealable before this Court as to the defendant Appellees by reason of Rule 54, Fed. R. Civ. P.

STATEMENT OF ISSUES

1. Whether the District Court had the authority to dismiss the action against the Defendant-Appellee, City of Norwich, because the municipality is not a "person" within the meaning of U.S.C. § 1983.

2. Whether the District Court had the authority to close the action statistically and place same in suspense with reference to the remaining defendants.

3. Whether the District Court had the authority to act in the interest of judicial economy by abstaining from further proceedings in this action until there had been an authoritative and definitive construction of the ordinance by a state tribunal.

STATEMENT OF THE CASE

The Appellants seek a summary judgment, pursuant to Rule 65, to declare a rarely invoked ordinance, unconstitutional and to enjoin enforcement of same by the Appellees. Appellants allege that the ordinance violates the First and Fourteenth Amendments, and seek to invoke Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343. The only stake plaintiffs allege is that there might be a "subjective chill" on their constitutional rights. The Appellants having never been apprehended, arrested or warned in any manner, nor at any time have ever been deprived of the use of public streets or way in any manner, and are not true parties in interest.

The District Court dismissed the action against the City, and exercised the doctrine of abstention that allows the Federal Court to defer adjudication when the meaning of a state statute is uncertain and the State Tribunal can pass on the question of construction. This would prevent needless conflict between state and federal courts.

- I. THE DISTRICT COURT HAD THE AUTHORITY TO DISMISS THE ACTION AGAINST THE DEFENDANT-APPELLEE, CITY OF NORWICH, BECAUSE THE MUNICIPALITY IS NOT A "PERSON" WITHIN THE MEANING OF U.S.C. § 1983.

U.S.C. § 1983 states "every person who". The cases are many so holding that a municipality is not a "person" for purposes of this section for either monetary or injunctive relief. City of Kenosha, Wis. v. Bruno, 412 U.S.507 (1973)

- II. THE DISTRICT COURT HAD THE AUTHORITY TO CLOSE THE ACTION STATISTICALLY AND PLACE SAME IN SUSPENSE WITH REFERENCE TO THE REMAINING DEFENDANTS.

Governmental action is of course subject to constitutional challenge, but individuals seeking to invoke judicial power to determine validity of executive or legislative action must show that they sustained or are in immediate danger of sustaining a direct injury as a result of that action. Laird v. Tatum, 408 U.S. 1 (1972). For Federal Courts to exercise their equitable power in cases of threatened state prosecutions without requiring a showing of prosecutorial bad faith or harassment, or other extraordinary circumstances, would expose every state criminal justice system to insupportable disruption. Bykofsky v. Borough of Middletown, 389 F. Supp. 836 (1975).

III. THE DISTRICT COURT HAD THE AUTHORITY TO ACT IN THE INTEREST OF JUDICIAL ECONOMY BY ABSTAINING FROM FURTHER PROCEEDINGS IN THIS ACTION UNTIL THERE HAD BEEN AN AUTHORITATIVE AND DEFINITIVE CONSTRUCTION OF THE ORDINANCE BY A STATE TRIBUNAL.

Decision of the constitutionality should be withheld pending proceedings to be taken in the State Courts to secure definitive construction of the ordinance. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959); R.R. Comm. of Texas v. Pullman Co., 312 U.S. 496 (1941)

CONCLUSION

The Judgment and Order of the District Court should be affirmed.